92-799

No.

Supreme Court, U.S.
FILED
NOV 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

DAVID C. SHILTON
KAREN L. EGBERT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RAYMOND B. LUDWISZEWSKI
Acting General Counsel
Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Whether, despite Congress's determination that the development of local air pollution control measures under the 1990 Amendments to the Clean Air Act is initially the responsibility of State and local governments, EPA is required to promulgate federal air pollution control plans for major urban areas in California because EPA found in 1988 that California had failed to meet requirements of the pre-1990 Act, even though those requirements were later repealed by the 1990 Amendments and replaced with new requirements that California has not yet had the opportunity to meet.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the United States Department of Transportation, the City of Sacramento, the Sacramento Area Council of Governments, Capital Gateway, Fong Ranch, William Payne, Kern Schumacher, Milburn Reid, Donald Ketscher, B & B Sons Enterprises, Centennial Development Co., and Whitney Properties were defendants in the district court; the Sierra Club was a plaintiff in the district court and appellee in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	10
Appendix A	1a
Appendix B	2a
Appendix C	7a

TABLE OF AUTHORITIES

Case:

Abramowitz v. *EPA*, 832 F.2d 1071 (9th Cir. 1987) 3

Statutes:

Clean Air Act, 42 U.S.C. 7401 *et seq.* 2
§ 110(a)(1)(A), 42 U.S.C. 7410(a)(1)(A) 2
§ 110(c)(1), 42 U.S.C. 7410(c)(1) (Supp. II 1990) 5
§ 110(c)(1)(B), 42 U.S.C. 7410(c)(1)(B) 7
§ 172(a)(1), 42 U.S.C. 7502(a)(1) 3
§§ 181-182, 42 U.S.C. 7511-7511a (Supp. II 1990) 4
§ 181(a), 42 U.S.C. 7511(a) (Supp. II 1990) 4
§ 182(b)(1), 42 U.S.C. 7511a(b)(1) (Supp. II 1990) 5
§ 182(c)(2), 42 U.S.C. 7511a(c)(2) (Supp. II 1990) 4
§ 182(c)(2)(A), 42 U.S.C. 7511a(c)(2)(A) (Supp. II 1990) 5
§ 182(c)(2)(B), 42 U.S.C. 7511a(c)(2)(B) (Supp. II 1990) 5
§ 182(c)(2)(C), 42 U.S.C. 7511a(c)(2)(C) (Supp. II 1990) 5

Statutes—Continued: Page

§ 182(g), 42 U.S.C. 7511a(g) (Supp. II 1990) 5
§ 193, 42 U.S.C. 7515 (Supp. II 1990) 5
Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 2
Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 4

Miscellaneous:

48 Fed. Reg. 5074 (1983) 3
49 Fed. Reg. (1984):
p. 30,300 3
p. 30,305 3
52 Fed. Reg. (1987):
p. 26,431 8
p. 26,434 8
53 Fed. Reg. 48,535 (1988) 4
56 Fed. Reg. (1991):
p. 56,694 4
p. 56,728 4
57 Fed. Reg. (1992):
p. 10,749 6
p. 22,194 ..... 3-4, 6, 9
p. 22,195 4

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v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The opinion of the district court (App., *infra*, 2a-6a), is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1992. On September 28, 1992, Justice

O'Connor extended the time for filing a petition for a writ of certiorari to and including November 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are reproduced at App., *infra*, 7a-10a.

STATEMENT

This case raises the question whether the Clean Air Act, as amended in 1990, requires the Environmental Protection Agency (EPA) to promulgate a federal air pollution control plan for large portions of California merely because EPA found in 1988 that California had failed to meet requirements of the pre-1990 Act, requirements that were repealed by the 1990 Amendments. This question is the subject of EPA's petition for a writ of certiorari in *United States Environmental Protection Agency, et al.* v. *Coalition for Clean Air, et al.*, also filed today. The instant case was decided by the same panel of the Ninth Circuit that rendered the decision in *Coalition for Clean Air*. The panel's brief order affirming the judgment of the district court in this case relies entirely on the panel's earlier decision in *Coalition for Clean Air*.

1. As described in more detail in our petition in *Coalition for Clean Air*, the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, required each State to submit to EPA state implementation plans (SIPs) for achieving and maintaining national ambient air quality standards. Section 110(a)(1)(A), 42 U.S.C. 7410(a)(1)(A). The 1977

Amendments allowed EPA to extend the deadline for attainment of the primary air quality standards in certain "nonattainment areas." Section 172(a)(1), 42 U.S.C. 7502(a)(1).

California requested, and EPA approved, an extension of the statutory attainment date for ozone in the Sacramento Air Quality Management Area to December 31, 1987. In 1982, the State submitted an updated ozone SIP for Sacramento. EPA initially proposed to disapprove the revised SIP on grounds that the plan did not provide for attainment of the ozone standard by 1987. 48 Fed. Reg. 5074 (1983). On July 30, 1984, EPA took final action to approve the control measures submitted by the State, but left open the question whether to approve the attainment demonstration in the Sacramento SIP. 49 Fed. Reg. 30,300, 30,305 (1984). Thereafter, in November 1987, the Ninth Circuit held in *Abramowitz* v. *EPA*, 832 F.2d 1071 (1987), that EPA lacks authority to defer action on a State's attainment demonstration while approving the control measures submitted with that demonstration.

2. In March 1987, the Environmental Council of Sacramento and the Sierra Club [hereinafter respondents] filed this action in the United States District Court for the Eastern District of California, alleging *inter alia* that EPA had a nondiscretionary duty to disapprove the 1982 ozone SIP for Sacramento and to promulgate an ozone federal implementation plan (FIP) for the Sacramento nonattainment area.[1] Pursuant to an initial agreement with the re-

[1] At the time the lawsuit was filed, the Sacramento nonattainment area included Sacramento County, Yolo County, and portions of Placer and Solano Counties. The Sacramento nonattainment area boundaries have since been extended to include portions of Sutter and El Dorado Counties. See 57

spondents, EPA took final action to disapprove the 1982 ozone SIP on December 1, 1988. 53 Fed. Reg. 48,535 (1988). Subsequently, respondents and EPA negotiated a settlement containing a schedule by which EPA would propose and promulgate a federal implementation plan for ozone. The settlement agreement, which was approved by the district court on June 26, 1989, provided that EPA could move to vacate the settlement in the event that pending legislation affected its obligations to promulgate a FIP.

3. On November 15, 1990, the President signed into law the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. Those Amendments deleted the provisions of Section 172 requiring that SIPs demonstrate attainment by 1982 or, if an extension had been approved, by December 31, 1987. Instead, the 1990 Amendments imposed new requirements for ozone nonattainment SIPs. Sections 181, 182, 42 U.S.C. 7511, 7511a (Supp. II 1990).

Pursuant to the 1990 Amendments, the Sacramento area is classified as a "serious" area for ozone nonattainment. For an ozone area classified as "serious," the primary ozone NAAQS must be attained as expeditiously as practicable, but not later than nine years after enactment of the Amendments. Section 181(a), 42 U.S.C. 7511(a) (Supp. II 1990). A State containing an area classified as "serious" must submit, within four years of enactment, a demonstration that the area's ozone SIP will achieve attainment by the 1999 attainment date. Section 182(c)(2), 42 U.S.C. 7511a(c)(2) (Supp. II 1990). In addition, the Part D ozone SIP for the "serious" Sacramento

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Fed. Reg. 22,194, 22,195 n.1 (1992); 56 Fed. Reg. 56,694, 56,728 (1991).

area must meet new milestones for interim reductions in emissions. 42 U.S.C. 7511a(b)(1), (c)(2)(A), (B), (C), and (g) (Supp. II 1990). As described in our petition in *Coalition for Clean Air*, moreover, the 1990 Amendments also substantially revised Section 110(c) with respect to the circumstances under which EPA would have to prepare FIPs. 42 U.S.C. 7410 (c)(1) (Supp. II 1990).

4. After reviewing the language and legislative history of the 1990 Amendments, which wrought comprehensive changes in the operation and structure of the Act, the EPA concluded that its pre-1990 obligations to promulgate FIPs in areas where it had found SIPs inadequate had been eliminated by the 1990 Amendments. Accordingly, EPA filed a motion to vacate the settlement in the *Coalition for Clean Air* case, then pending in the United States District Court for the Central District of California. After that court ruled in EPA's favor, EPA filed a similar motion in the instant case, asking the district court below to vacate the settlement agreement and dismiss the complaint in light of the 1990 Amendments.

The district court denied EPA's motion. App., *infra*, 2a-6a.[2] The district court found that the relevant language of the 1990 Amendments was ambiguous, but declined to defer to EPA's interpretation of the 1990 Amendments because it concluded that the Agency's interpretation had changed over time. App.,

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[2] The district court agreed with the *Coalition for Clean Air* district court's conclusion that the savings clause of the 1990 Amendments, Section 193, 42 U.S.C. 7515 (Supp. II 1990), did not apply to the settlement agreement in this case, because an agreement to promulgate a FIP is not a "control requirement" within the meaning of the savings clause. App., *infra*, 4a.

infra, 4a-5a. The district court observed that, prior to enactment of the 1990 Amendments, the EPA Administrator had sent a letter to the House of Representatives taking the position that the Amendments would require EPA to comply with " 'current FIP obligations.' " *Id.* at 5a. In the court's view, this pre-enactment letter, rather than the Agency's post-enactment analysis of the 1990 Amendments, constituted the contemporaneous agency interpretation of the amended Act to which judicial deference was due. *Ibid.*

5. EPA appealed to the United States Court of Appeals for the Ninth Circuit, and the case was submitted to the same panel that had already heard argument in the appeal in the *Coalition for Clean Air* case.[3] On July 1, 1992, that panel ruled in *Coalition*

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[3] After EPA filed its appeal in this case, the parties agreed that the Ninth Circuit's decision in the *Coalition for Clean Air* case would likely determine EPA's duties in this case. Accordingly, the parties entered into a stipulation modifying the settlement agreement to provide that in the event the *Coalition* decision established EPA's duty to promulgate a FIP, EPA would issue a proposed FIP for Sacramento within four months of issuance of the mandate in the *Coalition* case, and a final FIP six months thereafter. See 57 Fed. Reg. 10,749 (1992). This stipulation also provided that EPA would in the interim publish a list of control measures that it would include in any proposed FIP, rank those measures, and estimate emission reductions from each measure. EPA published this listing on May 27, 1992. 57 Fed. Reg. 22,194 (1992).

In an order issued on September 29, 1992, Circuit Judge Norris granted EPA's motion to stay issuance of the mandate in *Coalition for Clean Air* pending review by this Court. Under the terms of the above-referenced stipulation, that order also acted to stay EPA's obligations with respect to the Sacramento FIP. On October 8, 1992, respondents in

for Clean Air that new Section 110(c)(1)(B) retains pre-existing FIP obligations, even where (as here) the statutory provisions forming the basis for those obligations have been repealed by the 1990 Amendments. On July 9, 1992, the court of appeals panel issued a one-paragraph order affirming the judgment of the district court in the instant case on the basis of the court's opinion in *Coalition for Clean Air*. App., *infra*, 1a. Judge Noonan dissented, for the reasons given in his dissent in *Coalition for Clean Air*. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case raises legal issues identical to those presented in the petition for a writ of certiorari in *United States Environmental Protection Agency et al.* v. *Coalition for Clean Air, et al.*, filed concurrently with the filing of this petition. Accordingly, this petition should be held and disposed of in light of this Court's disposition of the petition in *Coalition for Clean Air*.

1. Just as in *Coalition for Clean Air*, the decision below interprets the 1990 Clean Air Act Amendments to preserve EPA's pre-1990 obligation to promulgate a FIP in lieu of a SIP that had been disapproved under the pre-1990 version of the Act, even though the particular requirement of the Act that gave rise to that disapproval has been eliminated as a result of the 1990 Amendments. As explained more

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this case moved the district court for an order modifying the settlement so that EPA's duties would no longer be tied to the mandate in *Coalition for Clean Air*, but would run instead from the date of the court of appeals mandate in the instant case, which issued on July 31, 1992. EPA filed an opposition to that motion on October 30, 1992, and the matter is now under submission.

fully in our petition in *Coalition for Clean Air*, the court of appeals' ruling dramatically alters the manner in which Congress chose to implement the new Amendments. The decision forces EPA to promulgate a FIP for the Sacramento area before the State of California has had an opportunity to produce a SIP implementing the requirements of the 1990 Amendments, even though Congress plainly intended that EPA would be called on to produce a FIP only if—and only to the extent that—the State has first failed to meet its obligations under the amended Act after having been given an opportunity to meet those obligations.

2. This case also is like *Coalition for Clean Air* in the dramatic impact the decision below is likely to have on the residents and economy of the Sacramento area. The Sacramento ozone-nonattainment area includes two urban counties and parts of four rural counties with a 1990 population of 1.6 million. Rapid population growth is expected in the 1990s. The area currently has the sixth largest number of average expected exceedances of the ozone standard in the country. Less than 10% of emissions of ozone precursors come from stationary sources. 52 Fed. Reg. 26,431, 26,434 (1987). Accordingly, emission reduction strategies will have to be targeted primarily at mobile sources, as well as at area sources such as pesticide application and architectural coatings. As explained in the petition in *Coalition for Clean Air*, EPA does not have the same range of techniques at its disposal to regulate these sources as do state and local authorities.

Moreover, since Sacramento is designated as a "serious" nonattainment area for ozone, the FIP must seek to attain the relevant national standard by 1999. This could require massive near-term reduc-

tions in emissions of ozone precursors. See 57 Fed. Reg. 22,194, 22,196 (1992) (suggesting that attainment of the ozone standard in the Sacramento area will require 75% reduction in emissions over a five-year period). In addition, recent data indicate that Sacramento's air pollution violations may be caused, on many occasions, by transport of pollution from the San Francisco Bay area or the San Joaquin Valley. In light of these unresolved issues regarding pollution transport, premature promulgation of a FIP could result in draconian control measures that are either counterproductive or unnecessary. Thus, the decision below is likely to have disruptive effects in the Sacramento area similar to those that the decision in *Coalition for Clean Air* threatens in the Los Angeles area.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's disposition of the petition for a writ of certiorari in *Coalition for Clean Air*.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

DAVID C. SHILTON
KAREN L. EGBERT
Attorneys

RAYMOND B. LUDWISZEWSKI
Acting General Counsel
Environmental Protection Agency

NOVEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-15293

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL., PLAINTIFFS-APPELLEES

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS-APPELLANTS

[Filed July 9, 1992]

ORDER

Before: Goodwin, Norris, and Noonan, Circuit Judges.

Appellants' and appellees' joint motion to submit this case to the panel considering the appeals in *Coalition for Clean Air v. EPA*, Nos. 91-55383, 91-55386, is GRANTED based on the parties' joint stipulation. The judgment of the district court is AFFIRMED. *Coalition for Clean Air v. EPA*, Nos. 91-55383, 91-55386 (9th Cir. 1992).

NOONAN, Circuit Judge:

For the reasons given by me in *Coalition for Clean Air v. EPA*, Nos. 91-55383, 91-55386, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. No. S-87-420 EJG

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL., PLAINTIFFS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

[Filed Dec. 2, 1991]

ORDER

The matter is before the court on defendant Environmental Protection Agency's ("EPA") motion to vacate the stipulation of settlement and order thereon and to dismiss the complaint. In this action, plaintiffs seek to compel EPA to promulgate a federal implementation plan ("FIP") for attainment of the primary National Ambient Air Quality Standards ("NAAQS") for ozone for the Sacramento area, pursuant to the Clean Air Act ("Act").[1] On April 17, 1989, plaintiffs and defendant EPA entered into a settlement agreement, subsequently modified twice by stipulation and order, under which EPA agreed to "undertake the promulgation of a FIP for the attain-

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[1] 42 U.S.C. §§ 7401 *et seq.*

ment and maintenance of the primary NAAQS for ozone for the Sacramento area." The action was then stayed.

Last year, the Clean Air Act Amendments of 1990 ("Amendments") were signed into law. Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401 *et seq.* (1990)). EPA contends that the Amendments have vitiated the legal foundation underlying the agency's obligation to promulgate a FIP in the Sacramento area. Plaintiffs, however, dispute the point vigorously, and argue that EPA retains its obligation to promulgate a FIP even under the amended Act.

The parties have briefed the matter thoroughly, and the court heard extensive oral argument at the November 15, 1991 hearing on the motion. The parties have addressed several concerns raised by the undersigned, and the court is now prepared to rule on the motion.

The Act, as amended, provides, in relevant part, that the EPA Administrator "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator— . . . (B) disapproves a state implementation plan submission in whole or in part . . . ." 42 U.S.C. § 7410(c) (1990). The question presented is whether the disapproved state plan to which the statute refers may be, as plaintiffs contend, a plan previously disapproved by the agency under the old law or whether, as the agency asserts, the state plan must be one promulgated subsequent to enactment of, and under the terms of, the new law.

As both sides note, United States District Judge Hupp of the Central District of California recently considered and ruled on the very issues now before this court. *See Coalition for Clean Air v. E.P.A.*, 762 F. Supp. 1399 (C.D. Cal. 1991). Judge Hupp's opin-

ion is thorough and well-reasoned, and this court agrees with his analyses of the statute's ambiguity and of the "savings clause" provision,[2] which analyses do not now bear repetition. However, the undersigned must part company with Judge Hupp as to the degree of deference to be accorded EPA's interpretation of the Amendments under the peculiar circumstances presented and must also differ with *Coalition for Clean Air* as to the significance of the language of a prior version of the statutory provision at issue.

Where, as here, a statute is ambiguous with respect to a specific issue, but the agency which must administer the statute has construed it, the court must determine whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984). This is so because considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Id.*, 467 U.S. at 843, 104 S. Ct. at 2782. However, an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to *considerably less deference* than a consistently held agency view. *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 466, 107 S. Ct. 1207, 1221 n.30 (1987).

Here, the agency's interpretation of the relevant provision has plainly changed over time. In a May 22, 1990 letter criticizing the House of Representatives for retaining mandatory FIP provisions, EPA Administrator William Reilly noted that "[t]he House has [deleted] language that relieved EPA of its current obligations to complete federal implementation

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[2] Pub. L. 101-549, Title I, § 108(1), 104 Stat. 2469 (codified at 42 U.S.C. § 7515 (1990)).

plans (FIP's) . . . In light of the new regime for state plan submissions, *it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations . . . In addition to current FIP obligations*, the House Committee bill requires EPA to promulgate comprehensive FIPs in the future . . . ." 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990) (emphasis added).

Thus, the agency's *contemporaneous* construction of the statute was in harmony with plaintiffs' present position. Now, however, EPA contends that § 7410(c) has the opposite effect—*viz*, that it *relieves* the agency's current FIP obligations. Plaintiffs suggest that this indicates that the agency, having failed to get what it wanted from Congress, is now attempting to achieve the same result in the courts. While there may be some merit to this argument (*see infra*), the court need not speculate on this. For our purposes, the critical fact is that the agency's contemporaneous construction carries persuasive weight, while its current interpretation, being in conflict with its initial position, is entitled to considerably less deference. *Watt v. Alaska*, 451 U.S. 259, 272-73, 101 S. Ct. 1673, 1681 (1982). The court is therefore inclined to defer to the agency's initial construction, and conclude that amended § 7410(c) maintains EPA's existing FIP obligations.

Further support for this conclusion lies in the fact that Congress contemplated, but rejected, an interim version of the Amendments which would have made FIP's discretionary rather than mandatory. As EPA Administrator Reilly noted, this version of the bill would have "relieved EPA of its current obligations to complete" FIP's. 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990). Of course, the rejected ver-

sion would also have had much broader consequences: the bill, by making FIP's entirely discretionary, would have eliminated EPA's *current and future* obligations to promulgate FIP's under *any* circumstances. Thus, Congress may well have rejected this approach to prevent this broader result, rather than simply to maintain EPA's existing FIP obligations. Nonetheless, it is well-settled that when Congress deletes from its final product a provision that appeared in an earlier version of the legislation, "its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 200, 95 S. Ct. 392, 401 (1974).

For the foregoing reasons, the court concludes that Congress, in enacting the Amendments, did intend to retain EPA's duty to promulgate FIP's in cases such as the one at bar. EPA's motion to vacate the settlement agreement and dismiss the complaint is therefore denied.[3]

IT IS SO ORDERED.

Dated 11/27/91.

/s/ Edward J. Garcia
EDWARD J. GARCIA
Judge
United States District Court

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[3] The court also notes that the "established rule" is that a change in the law does not render an agreement void. *Anita Foundations v. ILGWU National Retirement Fund*, 902 F.2d 185, 189 (2nd Cir. 1990). However, the parties did not address this problem, and *Anita Foundations* is sufficiently factually dissimilar from the case at bar that the court does not rely on this general principle, which may well be inapposite here, in reaching its conclusion.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Section 101 of the Clean Air Act, as amended, 42 U.S.C. 7401, provides:

(a) Congressional findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles; has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and

local programs to prevent and control air pollution.

(b) Declaration of purpose

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

Section 110(c) of the Clean Air Act, as amended, 42 U.S.C. 110(c), provides:

> (c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; parking surcharge; plan implementation
>
> (1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A) of this title, or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Section 193 of the Clean Air Act, 42 U.S.C. 7515, provides:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement

agreement, or plan in effect before November 15, 1990 in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

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Supreme Court, U.S.
FILED
DEC 8 1992
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No. 92-799

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF THE ENVIRONMENTAL COUNCIL OF SACRAMENTO AND SIERRA CLUB

JOSEPH J. BRECHER
1970 Broadway, 12th Floor
Oakland, CA 94612
(510) 272-0433
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether, even though the Environmental Protection Agency has entered into a binding stipulation to promulgate a Federal Implementation Plan for the Sacramento area, and despite the fact that the statutory language that compels the adoption of such a plan was not changed by the 1990 Clean Air Act amendments, EPA should be relieved of its obligation to provide relief for the breathing public of the area on the basis of dubious policy arguments.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Braxton v. U.S., 114 L.Ed.2d 385 6

Citizens for a Better Environment v. Costle, 515 F. Supp. 264 (N.D. Ill. 1981) 8

George v. Morgan Constr. Co., 389 F.Supp. 253 (E.D.Pa. 1975) 7

Havenfield v. H&R Block, Inc., 509 F.2d 1263 (8th Cir. 1975) 7

Logsdon v. Baker, 366 F.Supp. 332 (D.C. Cir. 1973) 7

New England Law Foundation v. Costle, 475 F. Supp. 425 (D. Conn. 1979) 8

Train v. NRDC, 421 U.S. 60 (1975) 8

STATUTES

47 Fed. Reg. 50,864 6

48 Fed. Reg. 5074 2

49 Fed. Reg. 30,300 ..... 3, 6

51 Fed. Reg. 34428, 34431 3

55 Fed. Reg. 12669 7

No. 92-799

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF THE ENVIRONMENTAL COUNCIL OF SACRAMENTO AND SIERRA CLUB

The Environmental Council of Sacramento and Sierra Club[1] oppose the Environmental Protection Agency's Petition for Writ of Certiorari and urge that it be denied.

[1] Respondents Environmental Council of Sacramento and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Supreme Court Rule 29.1.

The Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans for the Sacramento and Los Angeles air basins. This holding applies to only three areas in California and will have no further applicability under federal law.

STATEMENT OF THE CASE

This case presents an extreme example of a government agency doing everything it can to avoid performing its duty under the law. The result has been over a decade of unhealthy air for the citizens of the Sacramento area. In 1979, the State of California submitted an air quality plan for the Sacramento area in which it requested EPA to approve an extension of the statutory deadline for achieving the ozone standard to December 31, 1987. In August, 1982, the State submitted an updated plan which acknowledged that even if all measures contained therein were implemented, the ozone air quality standard would not be achieved by 1987.

On February 3, 1983, EPA proposed to disapprove the 1982 plan, primarily because it failed to demonstrate attainment of the ozone standard by any date. See 48 Fed. Reg. 5074. On July 3, 1984, EPA took "final" action on the 1982 SIP. It approved the control strategy in the SIP for the Sacramento area because the measures included in that strategy would strengthen the 1979 SIP. However, EPA announced that it would take no action on the attainment demonstration and the provisions to sustain reasonable further progress toward reducing emissions (RFP) contained in the amended SIP, because of its previous

finding that the ozone standard would not be attained. See 49 Fed. Reg. 30,300. Rather than disapprove the portions of the Sacramento area plan dealing with attainment demonstration and RFP, as originally proposed, EPA stated it would perform an in-depth evaluation to determine what additional measures would be necessary to achieve the NAAQS and would examine whether the Sacramento authorities were continuing to make all reasonable efforts to submit an approvable SIP.

At that point, EPA instituted its so-called "Reasonable Extra Efforts Program," (REEP) which emphasized the implementation of all reasonably available additional control measures, but did not set forth any specific attainment date. The agency later explained that it would implement the REEP program by requiring Sacramento and the other non-attainment areas in California to submit a new SIP revision by February 1987. As part of that revision, the Sacramento authorities would be required to set forth an "expeditious schedule" under which they would consider additional measures for adoption which may be necessary to demonstrate reasonable efforts under Part D of the Clean Air Act; to decide which of those additional measures to adopt; to justify the rejection of other measures; and to implement those measures which are adopted. See 51 Fed. Reg. 34428, 34431, col. 3, September 26, 1986. Despite this strong language by EPA, state and local authorities never submitted a revised SIP.

After lengthy, unsuccessful negotiations, the Environmental Council of Sacramento and the Sierra Club filed Action No. S-87-420 EJG in the Eastern District of California on March 17, 1987, seeking to require EPA to adopt a FIP for Sacramento. Negotiations resumed and on

April 17, 1989, the parties reached a settlement whereby EPA agreed to adopt a FIP in two stages – a Notice of Proposed Rulemaking by June 26, 1991, followed by a final Rulemaking on February 22, 1992. Thus, under the original stipulated timetable, EPA's FIP would be promulgated almost ten years after its duty to do so arose. It was approved by the court on June 22, 1989. Pursuant to the settlement, EPA formally disapproved the Sacramento SIP for ozone on December 1, 1988. 53 Fed. Reg. 48537.

Then began a series of delays which continues to this day. First, the agency asserted it had inadequate air pollution modelling data and needed an extra year to complete its task. Plaintiffs reluctantly agreed to this request, and an order thereon was entered on May 16, 1991. On May 6, 1991, EPA moved to vacate the settlement and dismiss the case on the ground that the 1990 Clean Air Act Amendments had relieved it of the obligation to promulgate a FIP. The motion was argued on November 15, 1991 and Judge Garcia issued a decision denying the motion on December 2, 1991. At the same time, the agency moved to vacate the similar Los Angeles FIP settlement in the Central District of California, in the *Coalition for Clean Air* case, described in the petition for writ of certiorari. The two District Courts issued split decisions on the issue, with the court ruling in favor of the e. vironmentalist position in the Sacramento case and the Central District deciding in favor of the government in the Los Angeles case.

Each decision was appealed to the Ninth Circuit. That court ruled in favor of the environmentalists in the *Coalition* case on July 1, 1992, issuing a lengthy opinion. One week later, on July 9, the same Ninth Circuit panel

issued a two-sentence opinion affirming the trial court's decision in the present case, citing the opinion in the Los Angeles case. Mandate issued in the current action on July 31, 1992. Subsequently, at the request of Respondents, the trial court issued orders on November 16 and 20, 1992, ordering EPA to propose a FIP by December 31, 1992 and to issue a final FIP six months after this Court disposes of the current petition in favor of Respondents. Thus, under the current schedule, Sacramento will finally have a FIP eleven years after it was originally due.

REASONS FOR DENYING THE PETITION

As the Solicitor General has noted, this case raises legal issues identical to those presented in the petition for certiorari in *U.S.E.P.A. v. Coalition for Clean Air*, which was filed at the same time as the current petition and, thus, should be disposed of in the same way as that case. Respondents in the *Coalition* case have fully discussed the lack of merit of the Government's position; there is no need for Respondents here to repeat those arguments. We do wish to emphasize certain key points, however.

A. None of usual reasons for granting certiorari are present in this case. Rule 10 of this Court's rules emphasizes that certiorari will be granted "only when there are special and important reasons therefor." That Rule sets forth three typical reasons for granting the writ: conflict between the circuits, conflict between state courts on federal issues, or the desirability of settling an important point of federal law on which this Court has not spoken. Avoidance of conflicts is the principal reason for

this court to accept jurisdiction. *Braxton v. U.S.*, 114 L.Ed.2d 385, 391.

None of those eventualities are present here. Every court that has addressed the issue in this case (except the trial court in the *Coalition* case) has decided in favor of the Respondents' position. Furthermore, this is **not** an instance in which the Court needs to settle an issue which will be of widespread and continual importance. As the Government concedes, " . . . [T]he particular legal question presented in this case is of limited legal scope and of a non-recurring nature." Petition in the *Coalition* case, p. 26.

B. The prospects of economic doom advanced by the Government are not credible. Since the normal considerations governing the granting of certiorari are admittedly not present here, the Government makes two policy arguments to support its position. Neither are well-founded. First, it claims that implementation of a FIP will result in economic collapse in the three areas of California that would be affected. This "sky-is-falling" argument is belied by the facts.

None of the other areas where FIPs have been adopted have experienced any noticeable dislocations because of the implementation of FIPs. The Government attempts to explain away the lack of intrusiveness of the two Arizona FIPs by noting that Phoenix and Tucson had already adopted most of the necessary control measures by the time the FIP was issued. But the same is true in Los Angeles and Sacramento – EPA has already approved a wide range of control measures for those areas. 47 Fed. Reg. 50,864, 49 Fed. Reg. 30,300. Thus, EPA will not be

"reinventing the wheel" when it adopts FIPs for those areas. Furthermore, the agency adopted a FIP for Chicago and, at last report, that city's economy has not been plunged into chaos.

The Government's predictions of dire economic consequences are based upon the declaration of David P. Howekamp, Director of the Air and Toxics Division for EPA Region IX. Petition in the *Coalition* case, p. 22. Mr. Howekamp's knowledge of economics is problematical, at best. The exaggerated hyperbole of his declaration shows the wisdom of the rule against accepting "expert" opinions from one who is totally unqualified in a given field. "An expert witness must show special knowledge of the very question upon which he is to express an opinion." *George v. Morgan Constr. Co.*, 389 F.Supp. 253, 259 (E.D.Pa. 1975). See also *Havenfield v. H&R Block, Inc.*, 509 F.2d 1263, 1273 (8th Cir. 1975); *Logsdon v. Baker*, 366 F.Supp. 332, 336 (D.C. Cir. 1973).

EPA's predictions of the need to include draconian measures that will bring the Sacramento region to its knees are not borne out by the facts. The agency has issued an Advanced Notice of Proposed Rulemaking which lists all the control measures which will likely have to be included in a Sacramento FIP. See 55 Fed. Reg. 12669, March 1, 1990. The list is included in Appendix A. As can readily be seen, the list proposes **no** harsh measures such as gas rationing. Thus, contrary to the Government's assertion (Petition, p. 8), disruption to the Sacramento area economy by a FIP will be minimal.

C. **Adoption of a FIP will not interfere with state air quality planning efforts.** The Government emphasizes that the 1990 Clean Air Act amendments emphasize state primacy in the effort to achieve the ambient air quality standards. This is true, but it is nothing new. Beginning with *Train v. NRDC*, 421 U.S. 60, 79 (1975), this court has acknowledged the State's "historically . . . primary role." Yet, during all that time, no court has ever held that EPA's FIP obligation under Section 110(c) conflicted with State primacy. To the contrary, several opinions emphasized the important role of FIPs as a potent way of motivating the states to comply with the law. See, *e.g., Citizens for a Better Environment v. Costle*, 515 F. Supp. 264, 272, 277 (N.D. Ill. 1981); *New England Law Foundation v. Costle*, 475 F. Supp. 425, 432 (D. Conn. 1979), *modified on other grounds*, 632 F.2d 936 (2d Cir. 1980).

The original Stipulation and Order of Settlement adopted by the trial court in this case (included in Appendix B) show how the SIP and FIP processes would work in tandem. In that document, the parties acknowledge that the State has the primary responsibility for developing an acceptable Plan; the FIP measures adopted by EPA would merely supplement the existing SIP provisions, which remain in force. See Appendix B, ¶ 6. Furthermore, the Stipulation obligates EPA to act quickly on any SIP revisions submitted by the State – within 7 months. See ¶ 8(c).

EPA's Status Report filed June 26, 1990 in this case (reproduced in Appendix C) illustrates the close partnership between EPA and local authorities in the planning process. That document shows that EPA and local Sacramento authorities have been working together on the air

planning process for that area. EPA staffers are members of the local Air Quality Technical Plan Committee and Air Quality Review committees, which meet every 4-6 weeks (¶ 3). The local agency conducted a major field study and monitoring program partially financed by EPA (¶ 4). The local agency produced an interim air quality plan, which was reviewed and evaluated by EPA. (¶ 5). EPA met with and discussed its Advanced Notice of Proposed Rulemaking for a FIP with local officials (¶ 6). Finally, EPA joined the State Air Resources Board in evaluating local planning efforts. The agency noted that "For purposes of the FIP, the District's planning functions are most important."

This recitation shows that the Government is being entirely disingenuous when it disputes that a FIP would do no more than "fill gaps in areas in which the State had failed to satisfy fully its obligations under the Act." (Petition in the *Coalition* case, p. 13.) The fact is that EPA's FIP efforts in Sacramento have been closely coordinated with local activities; there has been no duplication or conflict. Indeed, the two jurisdictions' activities have complemented each other. In short, the State is not precluded from developing and ultimately putting into force revised SIP measures simply because EPA is also developing a FIP. Indeed, the adoption of a FIP has been and will continue to be a powerful spur to State and local authorities to produce a new SIP on time and in compliance with the law.

D. EPA has its priorities backwards. The Government worries about problems the "regulated community" might have with a FIP. (*Coalition* petition, p. 25). Instead, it **should** be concerned with the needs of the "breathing

community," which has suffered with unhealthy air in Sacramento for more than three decades. The overarching intent of the Clean Air Act since its beginning was to achieve the ambient standards as soon as possible. That concern was not changed by the 1990 amendments. This Court should not yield to the Government's invitation to rewrite the law in favor of dirty air.

CONCLUSION

For the reasons stated, EPA's petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH J. BRECHER
1970 Broadway, 12th Floor
Oakland, CA 94612
(510) 272-0433
Counsel for Respondents

December 8, 1992

Appendix A – List of Potential FIP Control Measures

This ANPRM is intended to provide the public with a list of possible control measures that may be promulgated in a federal implementation plan for the Sacramento AQMA. The list includes every possible control measure that EPA could identify which may reduce emissions in the Sacramento area. The publication of this list, however, does not commit EPA to the proposal or promulgation of any or all of these measures.

By listing a measure, EPA is not claiming that the measure would, if promulgated, improve air quality in the Sacramento AQMA nor is EPA claiming that any of these measures are reasonably available control measures within the meaning of section 172(b)(2) or (3) of the CAA. EPA must carefully evaluate each possible potential control measure before considering any measure for inclusion in a FIP.

On-Road Motor Vehicles

On-road motor vehicles include passenger cars; light, medium, and heavy-duty trucks; buses; and motorcycles. In the Sacramento AQMA on-road motor vehicles are estimated to contribute 55.8 tons per day[1] (t/d) of

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[1] All inventory numbers are taken from the *Interim Regional Air Quality Plan*, Committee Review Draft (SACOG, September 1989) p. 76, and represent projections off a 1985 baseyear inventory. The inventories in the *Interim Plan* are draft and are subject to change.

reactive organic gases (ROG)[2] and 80.4 t/d of nitrogen oxides (NOx) in 1990 or 39.7 percent of the total ROG inventory and 67.6 percent of the total NOx inventory. While on-road motor vehicles are the largest source of VOC emissions in 1990, their contribution to the overall VOC inventory declines significantly in the future because of continuing reductions from already-adopted vehicle emission standards and from California's Smog Check program. However, on-road motor vehicles are now and will continue to be the largest source of NOx emissions.

There are two ways of reducing emissions from on-road motor vehicles. The first way, referred to as "mobile source control measures," is to reduce the rate at which motor vehicles emit pollutants through vehicle emission standards, inspection and maintenance programs (Smog Check), and the use of clean fuels. The second way, referred to as "transportation control measures," is to reduce the number of trips and/or miles driven by motor vehicles, change the time of day when trips are taken, or increase vehicle speeds by reducing congestion or improving traffic flow.

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from on-road motor vehicles include the following.

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[2] In this notice, the terms "reactive organic gases (ROG)" and "volatile organic compounds (VOC)" are used interchangeably.

Mobile Source Control Measures

1. Lower and/or in-use emission standards for light duty passenger vehicles, all weight ranges of trucks, and buses; emission standards for motorcycles.

2. Greater control of evaporative emissions from gasoline-powered vehicles.

3. Lower Reid Vapor Pressure (RVP) limits on gasoline sold during the ozone season; diesel fuel quality standards to reduce NOx emissions; gasoline fuel quality standards to prolong the life of on-board vehicle emission control systems.

4. Minimum sales level of low-emitting (e.g., methanol) motor vehicles or extremely low-emitting (e.g., electric) motor vehicles; required purchase by vehicle fleet operators of clean-fueled vehicles; the manufacture, distribution, and sale of clean motor vehicle fuels.

5. Enhancements to the current inspection and maintenance program (e.g., requiring annual inspections, reducing or eliminating waivers, expanding the geographical boundaries of the program); the identification and repair of "smoking" vehicles.

6. Requirements for the sale and use of oxygenated fuels (e.g., gasohol) during the ozone season.

Transportation Control Measures

1. Regulations for employer-based trip reduction programs which may include requirements for alternative work-hours, transit-use incentives, telecommuting and

teleconferencing, car/vanpool matching and/or subsidies, preferential parking for car/vanpools, and on-site services; extension of current local trip reduction regulations to multi-tenant employer complexes

2. Requirements that new facilities with over a threshold number of parking spaces receive a permit of approval based on air quality considerations prior to construction (management of parking supply).[3]

3. Regulations to reduce off-peak trips such as requiring merchants to offer customers alternative mode facilities and incentives and programs to increase the use of at-home shopping and banking services.

4. Conformity procedures under CAA section 176(c) that require detailed analysis of the air quality impacts of federally funded, approved, permitted, and/or licensed activities and require mitigation of or prohibit federal activities that have adverse air quality impacts, especially those activities that increase job/housing imbalances.

5. Use of the transportation funding priority requirement in CAA section 176(d) to advance air quality-beneficial transportation projects such as transit improvements, traffic flow improvements, nonrecurrent (accident-response) congestion relief programs, high-occupancy

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[3] Parking pricing has been shown to be an effective method of reducing the number of vehicle trips; however, EPA is prohibited from imposing parking surcharges in FIPs by section 110(c)(2)(B) of the CAA. This prohibition does not extend to state or local agencies adopting, and EPA approving, such programs as part of SIPs.

vehicle lanes, park and ride lots, and reduction of at-grade rail crossings.

6. Review and mitigation program for federally-assisted or owned indirect sources.[4]

7. Requirements for special event centers (e.g., stadiums, arenas, large concert halls) to develop programs that reduce trips to events at their centers.

8. Restrictions on truck traffic during peak traffic periods; requirements for off-peak delivery and shipping.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from on-road motor vehicles include the following.

1. Limits on vehicle registration which may include prohibiting the registration of older, higher-polluting vehicles.

2. Mandatory no-drive days.

3. Restrictions on the sale of motor vehicle fuels.

Organic Solvents

Organic solvents are hydrocarbon-based liquids that are used in the manufacture of or are contained in almost every product made. They are found in paints and inks; pesticides; and consumer products such as deodorants, auto care products, and household care products. They

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[4] EPA is prohibited from promulgating in FIPs an indirect source review program for non-federal facilities by section 110(a)(5)(A)(ii) of the CAA. A state or local agency may adopt, and EPA may approve, such a program as part of a SIP.

are also used in a wide variety of industries to clean (degrease), prime, and coat surfaces. In the Sacramento AQMA, emissions from solvent evaporation are estimated to be 51.0 t/d of ROG in 1990 or 36.3 percent of the total ROG inventory; solvent usage does not emit NOx. In the Sacramento AQMA, as throughout California, organic solvents are expected in the future to become the largest single emission source category of VOC.

Regulatory Measures: Potential techniques for the control of VOC from organic solvents include the following.

1. Reformulation to lower VOC content of solvents, coatings, primers, and clean-up solvents.

2. Substitution of less- or non-photochemically reactive compounds in solvents, coatings, primers, and/or clean-up solvents.

3. Specification of a maximum daily VOC emission rate from a source.

4. Specification of minimum transfer efficiency in coating operations.

5. Specification of the equipment used to apply surface coatings.

6. Controls on previously exempt coatings, solvents, and sources.

7. Add-on controls (afterburners or carbon adsorption).

8. Workpractice and recordkeeping rules.

9. Solvent disposal rules.

Source categories in the Sacramento AQMA that could potentially be subject to the new or additional FIP

regulatory controls are listed below. The specific techniques to be applied to a source category depend on the type and use of solvent to be controlled and, therefore, will vary among categories.

1. Can coating.
2. Road paving operations.
3. Degreasing operations.
4. Graphic arts (printing).
5. Aerospace manufacturing.
6. Fiberglass-reinforced plastics manufacturing.
7. Auto and truck refinishing.
8. Plastic, rubber, and glass coating operations.
9. Paper, film, and fabrics coating operations.
10. Semiconductor manufacturing.
11. Pesticide application.
12. Dry cleaning.
13. Pharmaceutical manufacturing.
14. Rigid and flexible computer disk manufacturing.
15. Metal parts cleaning and coating operations.

Products used in the Sacramento AQMA that could potentially be subject to reformulation, maximum VOC content limit, and/or substitution under FIP regulations include the following.

1. Asphalt paving materials.

2. Degreasing solvents.

3. Inks.

4. Architectural coatings.

5. Aerospace coatings.

6. Primers and clean-up solvents used in all coating operations.

7. Fiberglass resins.

8. Automobile and truck paints.

9. Adhesives.

10. Dry cleaning solvents.

11. Paper, film, and fabric coatings.

12. Consumer products such as personal care products (e.g., colognes, deodorants, and hair care products), household products (e.g., room deodorants, furniture polishes, and laundry products), lawn and garden pesticides, and automotive and industrial products (e.g., refrigerants, lubricants, and engine degreasers).

13. Agricultural and commercial pesticides, herbicides, and fungicides.

14. Marine coatings.

15. Building construction materials.

16. Barbecue lighter fluid.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC from organic solvents include the following.

1. Restrictions or prohibitions or on the manufacture, sale, and/or use of any solvent, pesticide, consumer solvent, and/or coating with a VOC content or a vapor pressure greater than a given limit.

2. Restrictions on the total sales/use of solvents, pesticides, consumer products, or coatings to a given level during a given time period.

Off-Road Mobile Sources

Off-road mobile sources include off-road motorcycles, recreational and commercial boats, trains, airplanes, farm equipment, construction equipment, home and commercial lawn care equipment, and other small utility equipment. In the Sacramento AQMA, these types of sources are estimated to emit 18.9 t/d of ROG and 24.5 t/d of NOx or 13.4 percent of the total 1990 ROG inventory and 20.6 percent of the total NOx inventory

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from off-road mobile sources include the following.

1. Electrification of utility equipment, locomotives, ships at berth, pleasure boat motors, and ground equipment at airports.

2. Use of clean fuels in utility equipment, locomotives, construction equipment, farm equipment, ground equipment at airports, and pleasure boat motors.

3. Emission standards for utility equipment, locomotives, new and reconditioned construction equipment, farm equipment, off-road motorcycles, and pleasure boat motors.

4. Airport operation programs that reduce aircraft taxiing and idling, require centralized power supply for aircraft at gates, and/or prohibit landing/take-off of non-Stage III aircraft.

5. Use of vapor recovery equipment during marine vessel loading, ballasting, and housekeeping.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from off-road mobile sources include the following.

1. Restrictions on the use of utility equipment, locomotives, motorized pleasure boats, and construction and farm equipment during the ozone season.

2. Restrictions on take-offs and/or landings of commercial and general aviation planes during the ozone season.

3. Restrictions on the docking, loading, and operation of marine vessels during the ozone season.

Petroleum Extraction and Marketing

This category includes emissions from oil and gas extraction in Yolo and Solano Counties and mobile source fuels distribution. Also included here and not in the fuel combustion category are emissions from fuel combustion during petroleum extraction. Emissions from petroleum extraction and marketing in the Sacramento AQMA are estimated to be 8.7 t/d of ROG and 2.1 t/d of NOx in 1990 or 6.2 percent of the total ROG inventory and 1.8 percent of the total NOx inventory.

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from petroleum extraction and marketing include the following.

1. Controls on oil production wells and other oil field equipment such as internal combustion engines, tanks, sumps, and pits; controls on leaks from valves, flanges, pumps, and compressors.

2. More stringent controls on tanks used for the storage of petroleum products.

3. Elimination of exemptions based on throughput and tank size in existing local rules for vapor recovery equipment at bulk gasoline distributors.

4. "Fail-safe" Stage I (underground storage tanks) vapor recovery at service stations; certification of installation and maintenance contractors of Stage II vapor recovery equipment (gasoline pump nozzles).

5. Vapor recovery controls during marine bunkering and lightering.

6. Vapor recovery equipment for pleasure boat fueling.

7. Vapor recovery equipment at airport transfer points of aviation fuel.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from petroleum extraction and marketing include the following.

1. Restrictions or prohibitions on the storage of petroleum products during the ozone season.

2. Restrictions or prohibitions on the extraction of petroleum during the ozone season.

3. Restrictions or prohibitions on the transfering, transportation, and/or dispensing of any petroleum product

including any motor vehicle fuels or aviation fuel during the ozone season.

Stationary Point and Area Sources

This category includes emissions from processes at point sources and area sources which are not included in the emission categories discussed previously. Sources in this category include chemical manufacturing, food and agricultural processing, waste handling and disposal, and wood and paper manufacturing. Emissions from these sources in the Sacramento AQMA are estimated to be 5.3 t/d of ROG and 0.3 t/d of NOx in 1990 or 5.3 percent of the total ROG inventory and 0.3 percent of the total NOx inventory.

Regulatory Measures: Potential FIP regulatory measures to control VOC and NOx from stationary point and area sources include the following.

1. Control of VOC emission releases to the atmosphere from airstripping, wastewater treatment plants, and soil decontamination.

2. Collection and recovery or destruction of landfill gases.

3. Add-on controls (carbon adsorption) to reduce emissions from fermentation at wineries and breweries.

4. Add-on controls on commercial charbroiling operations.

5. Add-on controls (afterburners) to reduce emissions from bread ovens at large commercial bakeries.

6. Controls on paper manufacturing.

7. More stringent control of fugitive emissions chemical plants.

The following regulatory measures potentially apply to all stationary point sources and most discrete area sources in this category as well as in the organic solvent; petroleum extraction and marketing; and fuel combustion categories.

1. More stringent levels of best available control technology (BACT) and lower emission thresholds for application of BACT.

2. Application of best available retrofit control technology (BARCT) on all existing sources.

3. Lowering or elimination of the emission thresholds (VOC and NOx) at which new sources or modifications to existing sources become subject to new source review and offset requirements; increased offset ratios for new and modified sources.

4. Elimination of the use of existing banked credits and prohibition on future banking of credits for source shutdowns, controls, or production curtailment.

Prohibitory Measures: Potential FIP prohibitory measures to control VOC and NOx from stationary point and area sources include the following.

1. Restriction on or prohibition of controlled burning (e.g., agricultural) during the ozone season.

2. Restriction on or prohibition of the operation of charbroilers and bakeries during the ozone season.

The following FIP prohibitory measures potentially apply to all stationary point sources and most discrete

area sources in this category as well as in the organic solvent; petroleum extraction and marketing; and fuel combustion categories.

1. Allowing no net growth in emissions by restricting or prohibiting the construction and/or modification of any source within the non-attainment area for which emissions are not fully off-set.

2. Shut-down of or curtailment of production at stationary pollution sources during the ozone season.

3. A cap on annual growth of VOC and NOx emissions from all sources to a pre-determined level.

Fuel Combustion

Fuel combustion sources include both VOC and NOx emissions emitted during the burning of fossil fuels in a wide variety of activities from industrial to agricultural and residential. Emission sources include stationary internal combustion (I/C) engines (pumps, compressors, small generators), boilers, water heaters, and steam generators. Emissions from fuel combustion in the Sacramento AQMA are estimated to be 0.9 t/d of ROG and 11.7 t/d of NOx in 1990 or 0.6 percent of the total ROG inventory and 9.8 percent of the total NOx inventory. Because of the importance of these sources to NOx emissions, fuel combustion controls are primarily NOx controls.

Regulatory Measures: Potential FIP regulatory measures to control NOx from fuel combustion include the following.

1. Emission standards for, or modifications to, new natural gas residential water heaters.

2. Emission standards or flue-gas controls, use of alternative fuels, burner modifications, and/or operating controls for industrial, institutional, and commercial boilers, steam generators, incinerators, and process heaters.

3. Emission standards for stationary I/C engines; electrification of, use of clean fuels in, flue-gas controls, or engine modifications on such engines.

4. Combustion treatment of exhaust streams, clean fuel use in, or combustion system modifications for afterburners.

5. Substitution of clean fuels (e.g., natural gas, methanol) for current uses of fuel oils/solid fossil fuels in all stationary source fuel combustion processes.

Prohibitory Measures: A potential FIP prohibitory measure to control NOx from fuel combustion is the following.

1. Restrictions or prohibitions on the use of certain higher-polluting stationary source fuels (e.g., fuel oils) during the ozone season.

APPENDIX B

DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE BLATNIK
United States Department of Justice
Land & Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2617

DAVID LEVI
United States Attorney
MARY L. GRAD
Assistant United States Attorney
650 Capitol Mall, Room 3305
Sacramento, California 95814
(916) 551-2752

LUCIA L. BLAKESLEE
Assistant Regional Counsel
United States Environmental Protection Agency, Region 9

Attorneys for Defendant United States
Environmental Protection Agency

JOSEPH J. BRECHER
Attorney at Law
506 – 15th Street
Oakland, California 94612
(415) 763-3594

KATHRYN BURKETT DICKSON
295 Fell Street, Suite A
San Francisco, California 94102
(415) 864-1725

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., and SIERRA CLUB, Plaintiffs, vs. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF TRANSPORTATION; CITY OF SACRAMENTO; COUNTY OF SACRAMENTO; SACRAMENTO AREA COUNCIL OF GOVERNMENTS, Defendants.	Case No. CIVS-87-0420 EJG STIPULATION AND ORDER OF SETTLEMENT (Filed Apr. 18, 1989)

Plaintiffs, Environmental Council of Sacramento and the Sierra Club, and Defendant, United States Environmental Protection Agency ("EPA"), through their respective counsel, hereby stipulate and agree as follows:

1. In March 1987, plaintiffs filed a Complaint in this action in the Eastern District of California under the Clean Air Act ("the Act"), 42 U.S.C. § 7604, against the EPA, the United States Department of Transportation, various local governmental agencies and various private parties. An Amended Complaint was filed on June 6, 1988 (hereinafter referred to as the "Complaint"). By their Complaint, plaintiffs sought to halt, reduce or ensure adequate mitigation for a proposed development in the North Natomas area of Sacramento. In addition, plaintiffs

alleged that EPA failed in its mandatory duty to disapprove the Sacramento State Implementation Plan ("SIP") for ozone and to promulgate a Federal Implementation Plan ("FIP") for attainment of the primary National Ambient Air Quality Standard ("NAAQS") in the Sacramento area.

2. Subsequently, plaintiffs entered into a settlement agreement with many of the defendants. EPA was not a party to those settlement negotiations. On August 8, 1988, the Court entered an Order of Partial Dismissal, dismissing claims against various defendants, not including the EPA.

3. On December 1, 1988, pursuant to an agreement with plaintiffs, EPA published final disapproval of the 1982 Sacramento Air Quality Management Plan ("AQMP") for attainment of the primary national ozone standard.

4. The final remaining issue between plaintiffs and EPA is the Third Claim for Relief in the Complaint which alleges that EPA has a non-discretionary duty to promulgate a FIP for the Sacramento area and seeks an order of the Court to direct EPA to promulgate a FIP for ozone in the Sacramento area.

5. The parties wish to effect a settlement of plaintiffs' Third Claim for Relief without expensive and protracted litigation and therefore have agreed to enter into this Stipulation. Nothing contained herein shall be construed as an admission by EPA that it has a duty otherwise to undertake any obligation agreed to herein.

6. Section 110(c)(1) of the Act provides that the Administrator of EPA shall prepare "an implementation plan, or portion thereof" for any State which fails to prepare and implement a SIP to achieve reasonable progress toward attainment of the NAAQS. Based on its December 1, 1988 disapproval of the 1982 Sacramento AQMP and pursuant to Section 110, EPA agrees to undertake the promulgation of FIP for the attainment and maintenance of the primary NAAQS for ozone for the Sacramento area according to the schedule described herein except to the extent that, prior to the date(s) on that schedule, EPA approves a State-submitted implementation plan for attainment of the primary ozone NAAQS for the Sacramento area.

The parties acknowledge that the primary responsibility for developing a comprehensive revision of the SIP lies with the Sacramento Area Council of Governments ("SACOG") and other responsible local and regional agencies. The parties also agree that the purpose of the measures to be promulgated by EPA pursuant to Section 110, as specified in Paragraph 8 herein, is to develop additional control measures as needed to create an approvable plan. EPA agrees that any plan or measures promulgated by EPA under the authority of Section 110, pursuant to Paragraph 8 herein, shall supplement, and hence keep in effect, the approved provisions of the present SIP and any additional provisions submitted by the State that EPA approves into the SIP before EPA takes final action to promulgate the plan under Section 110.

7. The parties jointly agree to request the Court to stay these proceedings until January 1, 1992 to permit EPA to develop and promulgate a FIP for attainment of

the primary NAAQS for ozone for the Sacramento area according to the schedule set forth below at Paragraph 8.

8. In the event the Court enters the Order which is part of this Stipulation, and subject to legal and equitable considerations that both parties or the Court may ultimately determine applicable, EPA shall, unless otherwise provided herein, take the following steps during the period of the stay:

a. Within three (3) months from the date of the entry of this Stipulation, EPA shall send plaintiffs a letter outlining EPA's workplan for the promulgation of the FIP;

b. Within six (6) months from the date of the entry of this Stipulation, EPA shall sign an Advance Notice of Proposed Rulemaking ("ANPRM") and shall subsequently publish this ANPRM in the Federal Register. The ANPRM, which shall solicit public comment, shall include, among other things:

i. a list of possible control measures that might be included in a FIP for the Sacramento area; and

ii. the criteria by which EPA will determine whether the local planning agencies are making the "reasonable efforts" toward the submission of an approvable SIP which are necessary to avoid the imposition of discretionary sanctions under Section 176(a) and (b).

c. In the event that the California Air Resources Board ("ARB") submits any SIP amendment for the Sacramento area to EPA during the period of this Stipulation,

EPA shall publish proposed approval of those amendments that EPA determines are approvable within three (3) months of its submittal, and shall take final action on such amendments within four (4) months from the published proposal;

d. Within twenty (20) months of the entry of this Stipulation, EPA shall make a preliminary decision whether the State has submitted an approvable SIP or whether it will be necessary to promulgate a FIP for the Sacramento area;

e. Within twenty-four (24) months of the entry of this Stipulation, the Administrator of EPA shall sign a Notice of Proposed Rulemaking ("NPRM") to be published in the Federal Register that sets forth either the proposed SIP or EPA's proposed FIP to attain the primary ozone NAAQS in the Sacramento area; and

f. Within thirty-two (32) months of the entry of this Stipulation, the Administrator of EPA shall sign a Notice of Final Rulemaking ("NFRM") to be published in the Federal Register that sets forth either EPA's approval of the final SIP or EPA's final FIP to attain the primary ozone NAAQS in the Sacramento area.

9. EPA shall confer, either in person or by telephone, at a mutually agreed upon time and place, with plaintiffs every four months during the period of the stay for the purpose of providing plaintiffs with information on the progress of the SIP/FIP development. EPA may, at its option, open these meetings to the general public or other governmental agencies.

10. The parties jointly agree to report to the Court the status of EPA's progress in undertaking the tasks described in Paragraph 8 above every six months after entry of the Order imposing the stay of proceedings referred to in Paragraph 7.

11. Plaintiffs may move the Court to vacate the stay of the proceedings referred to in Paragraph 7 and reactivate the litigation if:

a. EPA has substantially failed to carry out the tasks described in Paragraph 8; and

b. Plaintiffs have contacted EPA at least four (4) weeks before filing such motion to discuss the grounds for such motion and to attempt to resolve any disagreement between the parties without recourse to the Court.

12. By this Stipulation, plaintiffs do not waive any claims they have or may have against EPA, and EPA does not waive any defenses it has or may have against any to the claims advanced by plaintiffs.

13. This Stipulation may be modified at any time during the period of the stay by consent of the parties or upon motion to the Court by either party on a showing of good cause.

14. In the event that legislation enacted by the United States Congress during the period of the stay affects EPA's or the State's obligations under the Clean Air Act with respect to the final rulemaking on a SIP or FIP for the Sacramento area, EPA reserves the right to move the Court for an order vacating this Stipulation in its entirety and relieving EPA of any and all obligations under the Stipulation and Order.

15. Within thirty days after the promulgation of a Plan as set forth in Paragraph 8(f) above, plaintiffs shall file with the Court a motion to dismiss or withdraw the Complaint with prejudice. If plaintiffs fail to do so, EPA may file such a motion and plaintiffs shall not oppose dismissal with prejudice.

16. After the lodging of this Stipulation, parties to this litigation, other than the parties signing this Stipulation, shall have thirty days to comment on this Stipulation prior to its being entered.

17. Nothing in the terms of this Stipulation shall be construed to confer on the Court jurisdiction to review the substance of any decision to be made by the Administrator of EPA with respect to the approval of a SIP or the promulgation of a FIP for the Sacramento area.

WHEREFORE, the parties have executed this Stipulation and Order of Partial Settlement by their duly authorized counsel or legal representatives:

For defendant United States Environmental Protection Agency:

DONALD A. CARR
Acting Assistant Attorney General

Dated: 4/12/89

/s/ Lawrence Blatnik
LAWRENCE BLATNIK
U.S. Department of Justice
Land & Natural Resources Division
Environmental Defense Section

DAVID LEVI
United States Attorney

Dated: 4/14/89 /s/ Mary L. Grad
MARY L. GRAD
Assistant United States Attorney

Dated: 4/11/89 /s/ Lucia L. Blakeslee
LUCIA L. BLAKESLEE
Assistant Regional Counsel
U.S. Environmental Protection Agency

For plaintiffs Environmental Council of Sacramento and Sierra Club:

Dated: 4/4/89 /s/ Joseph J. Brecher
JOSEPH J. BRECHER

Dated: 4/5/89 /s/ Kathryn Burkett Dickson
KATHRYN BURKETT DICKSON

APPENDIX C

RICHARD B. STEWART
Assistant Attorney General
MICHAEL D. ROWE
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3144

DAVID LEVI
United States Attorney
MARY L. GRAD
Assistant United States Attorney
650 Capitol Mall, Room 3305
Sacramento, California 95814
(916) 551-2752

Attorneys for the United States
Environmental Protection Agency

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., and SIERRA CLUB, Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	No. CIVS-87-0420-EJG STATUS REPORT (Filed Jun 26, 1990)

On June 26, 1989, this court entered an Order, pursuant to Stipulation of Settlement by the parties, staying this proceeding until January 1, 1992. During that period, defendant Environmental Protection Agency ("EPA") has agreed to prepare, propose and promulgate a federal implementation plan ("FIP") for the attainment and maintenance of the primary National Ambient Air Quality Standard ("NAAQS") for ozone for the Sacramento area. EPA will develop and promulgate the FIP according to a schedule set forth in the parties' Stipulation of Settlement (the "Stipulation"). In compliance with the Court's June 26, 1989 Order, EPA hereby submits the following report on the status of its activities:

1. Weekly conference calls among EPA personnel working on FIP development for various locales in Region 9 have continued through this six month period. The calls typically are one hour in length and are devoted to coordinating FIP development activities and reaching decisions on critical FIP issues.

2. Region IX staff working on the Sacramento FIP continue to evaluate work products from EPA contracts awarded to assist in the development of the South Coast and Ventura FIPs to determine applicability in developing the Sacramento FIP. The contracts for the South Coast FIP are nearing completion in order to support the Notice of Proposed Rulemaking which must be signed, pursuant to court order, by the Administrator no later than July 31, 1990. The South Coast FIP is currently scheduled to be finalized, and the Ventura FIP proposed, before the Sacramento FIP is proposed. It is Region IX's intention to utilize applicable measures from these areas in the Sacramento FIP.

3. Since May, 1987, the Sacramento Area Council of Governments ("SACOG") has been coordinating efforts to update the 1982 Sacramento Air Quality Plan for the Sacramento Air Quality Maintenance Area ("AQMA"). As part of the update process, three advisory committees were formed to provide guidance and advice on the work being performed. EPA, Region IX staff are voting members on two of these advisory committees: the Air Quality Plan Technical committee ("AQPTC") and the Air Quality Technical Review committee ("AQTRC") for modeling. In addition to Region IX staff, the AQPTC is comprised of representative from SACOG, the cities and counties within the Sacramento AQMA, the Cleaner Air Partnership of Sacramento, and Air Pollution Control Districts within the Sacramento AQMA. In addition to Region IX staff, the AQTRC for modeling is comprised of representatives from SACOG, Air Pollution Control Districts within the Sacramento AQMA, and the California Air Resources Board. Both the AQPTC and the AQTRC meet every 4 to 6 weeks. Region IX staff continue to attend these meetings regularly.

4. Under the leadership of SACOG, a major field study and monitoring effort was conducted last summer. Information collected during this study was to be used to support air quality modeling for Sacramento. However, unusual weather in the Sacramento area made it impossible to gather the necessary meteorological and emissions data to run the model. During January and February of 1990, the AQTRC for modeling met to analyze the available options and decided to repeat the field study this summer. Contracts are now underway to carry out this summer's study, and equipment is being located in the

field. Intensive monitoring will commence in July and will continue through August, 1990. EPA staff is overseeing this work through the AQTRC.

EPA intends to award $640,000 in FY-90 federal grant funds to Sacramento agencies toward these monitoring and modeling efforts. These funds will be passed through the Sacramento Metropolitan Air Quality Maintenance District ("SMAQMD") to SACOG. SACOG will, in turn, contract with Systems Applications Incorporated and Sonoma Research.

5. In January of 1990, SACOG produced a final "Interim Regional Air Quality Plan." This Interim Plan provides a new emissions inventory through the year 2010, evaluates various emission control strategies, ranks control strategies in terms of relative effectiveness, and sets forth a process to obtain public input as well as to obtain commitments by cities and counties in the AQMA to adopt various emission control measures. SACOG is now in the process of obtaining these commitments from the Sacramento area jurisdictions. Region IX staff continues to review and evaluate the Interim Plan through the AQPTC.

6. On March 1, 1990, the Regional Administrator signed an Advanced Notice of Proposed Rulemaking ("ANPRM") for the Sacramento area. The ANPRM was subsequently published on April 5, 1990 (55 FR 12669). The ANPRM contains two parts. The first part is a list of possible control measures that might be included in a FIP for the Sacramento area. The second part is a set of criteria by which EPA will determine whether the Sacramento area and the State are making reasonable efforts to

submit an adequate air quality plan. The publication of the ANPRM satisfies EPA's obligations pursuant to paragraph 8.b of the Stipulation.

Prior to the signing of the ANPRM, Region 9 developed a communication strategy to prepare the State and Sacramento local agencies for EPA's action. On February 27, 1990, EPA staff met with State and local agencies staff to discuss the ANPRM.

EPA solicited public comment on both parts of the ANPRM. The comment period closed on June 4, 1990. Region IX is now monitoring the State and local agencies' activities in light of the reasonable efforts criteria.

7. On April 20, 1990, EPA staff conferred via telephone with representatives of plaintiffs to discuss the progress of SIP/FIP development. This conference call was conducted to satisfy EPA's obligations under paragraph 9 of the Stipulation. The discussion focused on plaintiffs' comments and questions on the ANPRM.

8. Region IX joined the California Air Resources Board ("CARB") in conducting a comprehensive program evaluation of the SMAQMD. EPA and CARB reviewed many of the SMAQMD's programs including new source review, asbestos, compliance, monitoring, rule development, and planning. For purposes of the FIP, the District's planning functions are most important. The planning portion of the evaluation was conducted during April, 1990 through more than sixteen interviews with planning staff and managers at the SMAQMD, SACOG, the City of Sacramento, the County of Sacramento, and the Cleaner Air Partnership of Sacramento. EPA and the CARB are

now in the process of drafting program evaluation findings and recommendations.